

STATE OF MICHIGAN
COURT OF APPEALS

In re APPLICATION OF WISCONSIN
ELECTRIC POWER FOR RECONCILIATION.

TILDEN MINING COMPANY, L.C., and
EMPIRE IRON MINING PARTNERSHIP,

UNPUBLISHED
May 8, 2014

Appellants,

v

No. 314379
MPSC
LC No. 00-016367

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee,

and

WISCONSIN ELECTRIC POWER COMPANY,

Petitioner-Appellee.

Before: OWENS, P.J., and MURRAY and RIORDAN, JJ.

PER CURIAM.

Appellants, Tilden Mining Company, L.C., and Empire Iron Mining Partnership, appeal as of right the Michigan Public Service Commission's (PSC's) order regarding Wisconsin Electric Power Company's (Wisconsin Electric's) application for its renewable cost reconciliation in the 12-month period ending on December 31, 2010. We affirm.

I. FACTUAL BACKGROUND

This case involves the Clean, Renewable, and Efficient Energy Act, MCL 460.1001 *et seq.* (the Act). The Act "requires regulated electric utilities to adopt 'renewable energy plans' in which the electric companies are required to demonstrate how they will achieve compliance with the Act's requirements for obtaining electric capacity and energy production from 'renewable energy resources' as defined in the Act. See MCL 460.1011(h) and (i); MCL 460.1021 to MCL 460.1053." *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254, 256-258; 820 NW2d 170 (2011).

Relevant for this appeal, the Act provides for utilities to recover costs in two ways: (1) receiving the estimated cost of what energy would have cost (in MWh) if acquired from conventional sources, known as the transfer price. MCL 460.1047(2)(b)(iv). This expense is recovered through the utility's "power supply cost recovery" (PSCR) clause. MCL 460.1049(3)(c); MCL 460.6j;¹ and (2) utilities pass onto their retail customers—appellants—the rest of the cost of renewable energy through an "incremental cost of compliance" surcharge. MCL 460.1011(l). "The surcharge will be assessed for the 20-year life of the program and can be front-loaded so that the utility can build up a balance from excess revenues during early years of the program and use that balance to fund revenue shortfalls during the program's later years." *In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App at 258; MCL 460.1047(3). However, this surcharge is capped. MCL 460.1021(3); MCL 460.1045.²

A utility's renewable energy plan, which includes its proposed cost recovery mechanisms, is reviewed in an initial proceeding called a renewable energy plan (REP) case. MCL 460.1021. A utility is required to include the expected incremental cost of compliance with the renewable energy standards for a 20-year period (beginning when the plan is approved). MCL 460.1021(2)(c). Then, on an annual basis, a utility is required to file a renewable cost reconciliation proceeding. MCL 460.1049. In such cases, the PSC must (1) determine a utility's compliance with the Act; (2) adjust the surcharge so caps are not exceeded; (3) establish the transfer price; and (4) adjust the minimum balance of accumulated reserve funds. MCL 460.1049(3).

Here, the parties primarily dispute whether the PSC erred regarding the transfer price. Wisconsin Electric filed its REP on March 4, 2009 (Case No. U-15812). The relevance in this case pertains to Glacier Hills, which is a wind farm. In the instant RE reconciliation proceeding, appellants argued that the PSC should not, and could not, use the \$80.41/MWh set out in Case No. U-15812 for "2012 Wind" as a transfer price associated with the Glacier Hills wind farm. Essentially, appellants were objecting to the fact that the transfer price associated with a renewable energy project was being treated as a floor. The PSC ultimately determined that the transfer price could be treated as a floor to ensure the economic viability of a project and to provide assurances to the utility that these amounts would be recoverable. Thus, the PSC

¹ MCL 460.6j provides:

"Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

² The caps are as follows: \$3.00 per month per residential customer meter; \$16.58 per month per commercial secondary customer meter; and \$187.50 per month per commercial primary or industrial customer meter. MCL 460.1045(2).

ultimately determined that a transfer price of \$80.41/MWh could be applied prospectively to Wisconsin Electric's Glacier Hills wind farm.

As Wisconsin Electric outlines, "[t]he primary issue in this appeal is whether Act 295 requires that previously established transfer prices applicable to particular projects be retroactively revised in each annual RE reconciliation based upon historical prices in effect during the prior year." Appellants contend that the PSC erred in answering that question in the negative.

II. STANDARD OF REVIEW

The following standards apply when we review PSC decisions:

The standard of review for PSC orders is narrow and well-defined. Pursuant to MCL 462.25, all rates, fares, charges, classification and joint rates, regulations, practices, and services prescribed by the PSC are presumed, *prima facie*, to be lawful and reasonable. A party aggrieved by an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. To establish that a PSC order is unlawful, the appellant must show that the PSC failed to follow a mandatory statute or abused its discretion in the exercise of its judgment. And, of course, an order is unreasonable if it is not supported by the evidence. In sum, a final order of the PSC must be authorized by law and supported by competent, material, and substantial evidence on the whole record.

An agency's interpretation of a statute, while entitled to respectful consideration, is not binding on the courts, and it cannot conflict with the Legislature's intent as expressed in the language of the statute at issue. [*In re Review of Consumers Energy Co Renewable Energy Plan*, 293 Mich App 254, 267-268; 820 NW2d 170 (2011) (quotation marks and citation omitted).]

With respect to the PSC's factual determinations:

Judicial review of administrative agency decisions must not invade the province of exclusive administrative fact-finding by displacing an agency's choice between two reasonably differing views. When reviewing the decision of an administrative agency for substantial evidence, a court should accept the agency's findings of fact, if they are supported by that quantum of evidence. A court will not set aside findings merely because alternative findings also could have been supported by substantial evidence on the record. [*Id.* (quotation marks and citation omitted).]

With respect to appellants' argument that the PSC's order is unreasonable because it is not supported by competent, material, and substantial evidence on the whole record, the following principles apply:

In general, the PSC has wide latitude when choosing whether to credit expert witness testimony in a PSC case. It is for the PSC to weigh conflicting

opinion testimony of the qualified ('competent') experts to determine how the evidence preponderated. Expert opinion testimony is 'substantial' if offered by a qualified expert who has a rational basis for his views, whether or not other experts disagree. Substantial evidence is more than a mere scintilla of evidence, but may be less than a preponderance of the evidence. The testimony of even one expert can be 'substantial' evidence in a PSC case. [*Id.* at 284-285 (quotation marks and citations omitted).]

In addition, the PSC is entitled to consider all lawful elements in determining rates, and is not bound by a single formula or method as it may make pragmatic adjustments when warranted. *In re Application of Consumers Energy Co*, 281 Mich App 352, 360; 761 NW2d 346 (2008).

III. TRANSFER PRICE

Appellants have not shown that the PSC's decision to use the transfer price established for "2012 Wind" in PSC No. U-15812 as a transfer price floor for Wisconsin Electric's Glacier Hills wind farm was unlawful or unreasonable.

The concept of a transfer price floor can be found in the PSC's temporary order in Case No. U-15800. The PSC articulated the following:

Section 47 requires the Commission to annually set the price per megawatt hour to be transferred to retail customers through the regulated provider's power supply cost recovery (PSCR) clause. Section 49 requires the transfer price to be established in the context of an annual renewable cost reconciliation proceeding. Because the 2009 renewable energy plan proceeding will precede the first annual renewable energy reconciliation, the plan filings will need to estimate the transfer prices over the 20-year plan period. All renewable engineering, procurement, and construction contracts, or contracts for renewable energy systems that have been developed by third parties for transfer of ownership to an electric provider, that have been reviewed and approved by the Commission in a particular year will have the transfer price established as a floor for the lifecycle of the project. Provider-owned projects will have transfer prices set in vintages. Doing so ensures that the economic viability of projects that have been committed to will not be jeopardized by transfer prices that change in future years.

In a renewable energy plan, PSCR transfer revenues are subtracted from the total cost of compliance, as determined by Section 47(2)(a). The transfer price is a primary determinant of the incremental cost of compliance. The PSCR transfer price:

- (a) is unique to each provider;
- (b) reflects the value of long-term capacity and energy;
- (c) is not the current MISO market price of energy, but may use historical MISO prices as a starting point for a 20-year projection of the value of renewable energy and capacity;

(d) need not be tied to the avoided price of a new conventional coal-fired facility; and

(e) other factors determined relevant by the Commission.

The transfer price may be separately calculated for differing renewable technologies to reflect availability and the value of capacity; e.g., the capacity value of a landfill gas facility may differ from the capacity value of a wind farm.

The PSCR transfer price may be adjusted by an hourly distribution curve to yield an hourly price per megawatt hour for the 8,760 hours per year.

Appellants, however, contend that transfer prices must be revisited during each RE reconciliation proceeding and reset using the actual historical values of energy, rather than the initially projected ones. We disagree. As noted by the PSC and Wisconsin Electric, the Legislature imbued the PSC with broad authority to set the rates of renewable energy projects in furtherance of the Act's goal. To this end, MCL 460.1191 provides:

(1) Within 60 days after the effective date of this act, the commission shall issue a temporary order implementing this act, including, but not limited to, all of the following:

(a) Formats of renewable energy plans for various categories of electric providers.

(b) Guidelines for requests for proposals under this act.

(2) Within 1 year after the effective date of this act, the commission shall promulgate rules to implement this act pursuant to the administrative procedures act of 1969, 1969 PA 306, MCL 24.201 to 24.328. Upon promulgation of the rules, the order under subsection (1) is rescinded.

Appellants, however, argue that specific statutory language renders the PSC's method unlawful. They observe that the idea of a transfer price floor is not specifically mentioned in the Act. They also highlight MCL 460.1049, which provides:

(1) This section applies only to an electric provider whose rates are regulated by the commission. Concurrent with the submission of each report under section 51, the commission shall commence an annual proceeding, to be known as a renewable cost reconciliation, for each electric provider whose rates are regulated by the commission. . . .

(2) At the renewable cost reconciliation, an electric provider may propose any necessary modifications of the revenue recovery mechanism to ensure the electric provider's recovery of its incremental cost of compliance with the renewable energy standards.

(3) The commission shall *reconcile* the pertinent revenues recorded and the allowance for the nonvolumetric revenue recovery mechanism with the amounts *actually expensed and projected* according to the electric provider's plan for compliance. The commission shall consider any issue regarding the reasonableness and prudence of expenses for which customers were charged in the relevant reconciliation period. In its order, the commission shall do all of the following:

(b) Adjust the revenue recovery mechanism for the incremental costs of compliance. The commission shall ensure that the retail rate impacts under this renewable cost reconciliation revenue recovery mechanism do not exceed the maximum retail rate impacts specified under section 45. The commission shall ensure that the recovery mechanism is projected to maintain a minimum balance of accumulated reserve so that a regulatory asset does not accrue.

(c) *Establish the price per megawatt hour for renewable energy and advanced cleaner energy capacity and for renewable energy and advanced cleaner energy to be recovered through the power supply cost recovery clause* under section 6j of 1939 PA 3, MCL 460.6j, as outlined in section 47(2)(b)(iv). [(Emphasis added) (footnotes omitted).]

Appellants further rely on language in MCL 460.1047(2)(b)(iv), which provides:

After providing an opportunity for a contested case hearing for an electric provider whose rates are regulated by the commission, *the commission shall annually establish a price per megawatt hour*. In addition, an electric provider whose rates are regulated by the commission may at any time petition the commission to revise the price. In setting the price per megawatt hour under this subparagraph, the commission shall consider factors including, but not limited to, projected capacity, energy, maintenance, and operating costs; information filed under section 6j of 1939 PA 3, MCL 460.6j; and information from wholesale markets, including, but not limited to, locational marginal pricing. This price shall be multiplied by the sum of the number of megawatt hours of renewable energy and the number of megawatt hours of advanced cleaner energy used to maintain compliance with the renewable energy standard. The product shall be considered a booked cost of purchased and net interchanged power transactions under section 6j of 1939 PA 3, MCL 460.6j. For energy purchased by such an electric provider under a renewable energy contract or advanced cleaner energy contract, the price shall be the lower of the amount established by the commission or the actual price *paid* and shall be multiplied by the number of megawatt hours of renewable energy or advanced cleaner energy *purchased*. The resulting value shall be considered a booked cost of purchased and net interchanged power under section 6j of 1939 PA 3, MCL 460.6j. [Emphasis added.]

Read together, these two statutes require transfer prices to be established annually. Appellants therefore conclude that these provisions require annual true-ups of the transfer price to reflect actual (or historical), rather than projected, pricing. This argument overlooks that while both MCL 460.1047(2)(b)(iv) and MCL 460.1049 require the PSC to establish a transfer price, neither statute specifies how transfer prices are to be applied for a specific renewable energy project, particularly in terms of whether they are to be applied retroactively or prospectively.

MCL 460.1047(2)(b)(iv) also specifies that in establishing a transfer price, the PSC shall consider “factors including, but not limited to, *projected* capacity, energy, maintenance, and operating costs[.]” (Emphasis added). This supports Wisconsin Electric’s and the PSC’s position. Also, a plain reading of the second to last sentence in MCL 460.1047(2)(b)(iv)—that the price to be charged is the lower of the amount established by the PSC or the amount paid, multiplied by the number of MWh purchased—only requires that if the company actually purchases power for less than the amount calculated using the applicable transfer price, it cannot charge its customers the calculated amount, but must use the actual price paid. Nor can the utility charge its customers higher than the amount calculated using the applicable transfer price floor. Nothing in this provision requires a true-up of the transfer price.

Moreover, while appellants seem to characterize the reconciliation proceedings as exhaustive, pursuant to MCL 460.1049(3), what is to be “reconcile[d]” in a RE reconciliation proceeding is “the pertinent revenues recorded and the allowance for the nonvolumetric revenue recovery mechanism [the surcharges] with the amounts actually expensed and projected according to the electric provider’s plan for compliance.” The transfer price is not among the listed items to be reconciled with actual historical prices.

Further, any suggestion that the practice of setting transfer price floors would result in a utility over-collecting costs is meritless. As Wisconsin Electric’s expert, Thomas Lorden, testified: “The transfer prices approved in Case No. U-15812 were established as a floor for the lifecycle of the projects, and are subject to reduction only if the actual cost of the renewable energy was less than the transfer price.” Thus, as appellants concede in their reply brief, “[t]here is no question that the utility is limited to recovering no more than the actual cost of its renewable energy resources.” Rather, the issue is how a utility is recovering their actual costs, either through the PSCR or surcharge mechanisms. Therefore, to the extent that appellants’ argument portrays the utility as somehow receiving a windfall through this process of setting a transfer price floor, such characterizations are inaccurate.

We also find the rationale behind the PSC’s decision reasonable. The PSC has consistently found that a transfer price floor established for each project is necessary because it gives the utility a viable way of planning its renewable energy acquisition program in an attempt to meet its statutorily-required renewable energy targets without exceeding the caps on the surcharge, with the assurance to the utility that these amounts would be recoverable. It also ensures that the economic viability of projects to which the company has committed will not be jeopardized by constantly revised transfer prices. The PSC’s rationale is reasonable, particularly given the fact that this was the first REP plan year.

Given the silence in the statute regarding appellants' proposed "true-ups," we find that the PSC's decision declining to adopt this method cannot be deemed unreasonable and unlawful. The stated rationale behind the PSC's methodology is reasonable and promotes stability. It also is a viable way of reconciling the language of the Act's provisions.

Further, even if we were to review whether the precise transfer price of \$80.41/MWh is supported by competent, material, and substantial evidence, we find that appellants' argument has no merit. Both Lorden and the Staff's expert, Jesse Harlow, testified that it was proper to use the \$80.41/MWh figure. When Harlow was asked whether the transfer price of \$80.41 levelized over the life of the 2012 Wind project was reasonable, he replied that it was because:

The transfer price of \$80.41 levelized over the life of the project is consistent with and lower than the transfer prices of other Michigan electric providers at the time. As shown in [exhibits,] the transfer price schedules for these electric providers exceed the \$80.41/MWh level in 2015 and reach a maximum of \$143.62/MWh in the last year of the planning period, 2029. The average transfer price over the 20 year period for these two electric providers exceeds \$96/MWh if the lower transfer prices in 2009 – 2011 are included and exceeds \$102/MWh if the transfer prices for 2009 – 2011 are excluded, which aligns with the method used to determine the \$80.41 levelized transfer price.

Thus, the evidence below supports the PSC's determination. Additionally, appellants' argument relating to the approval of the Glacier Hills wind farm itself has no merit. The Act provides that, for utilities with more than one million Michigan customers, all renewable energy contracts must be separately approved by the MPSC, even if located out of state. MCL 460.1033(3). However, this provision is silent regarding the contracts for utilities with less than one million customers, such as Wisconsin Electric. The Act also provides that the PSC can review information from other states in deciding whether to approve a particular project and an REP. MCL 460.1021(6)(b). Thus, where Wisconsin's PSC has approved the Glacier Hills project, appellants have not demonstrated that the PSC's decision to use Wisconsin's PSC's approval to support the use of the transfer price in the instant proceeding was unlawful or unreasonable.³

³ Further, appellants' acknowledge in their reply brief to the PSC's appellee brief that they are not raising a challenge to the eligibility of Glacier Hills for purposes of Act 295. Moreover, appellants' arguments based on the settlement agreement in Case No. U-15812 are meritless. While the implementation of the settlement agreement may have limits, nothing in the settlement agreement prohibited the PSC from implementing the REP in future reconciliation cases.

IV. CONCLUSION

Therefore, we find no error requiring reversal in the PSC's decision to treat transfer prices as floors or in its implementation of an \$80.41/MWh transfer price for Glacier Hills. We affirm.

/s/ Donald S. Owens

/s/ Christopher M. Murray

/s/ Michael J. Riordan